

PPSA Retention of Title Precedent Case - Debtor Transfers to Related Entities and Lay-by Sales

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Summary

The Supreme Court of Victoria on 17 December 2014 delivered judgment in *Lewis* and *Templeton* as liquidators of *Warehouse Sales Pty Limited (in Liquidation)* ("Warehouse Sales") [2014] VSC 644 which is relevant to businesses which sell goods on retention of title terms.

The Court found:

- A transfer of goods by a debtor to a related entity of the debtor was a transfer free of the retention of title security interest of certain suppliers over the goods.
- The supplier's retention of title security interests over stock has priority over a claim of lay by sale customers of the debtor.
- All other sales by a debtor, even part paid sales, were free of any retention of title security interest of a supplier.

In light of this judgment, trade suppliers may better protect their retention of title rights over stock sold on credit terms by having a provision in their terms of trade prohibiting sales by their customers to related parties.

Background

Warehouse Sales and WHS2 Pty Limited (in Liquidation) ("WHS2") carried on the business of selling white and brown goods obtained from suppliers through a number of stores in Victoria. WHS2 is a related entity of Warehouse Sales and operated a store in Wodonga.

The liquidators brought proceedings seeking judicial advice as to certain items of property held by Warehouse Sales and WHS2. A number of major suppliers were joined to the proceedings by the liquidators effectively as contradictors. The Department of Consumer Affairs Victoria also appeared.

Matters in Issue

The proceedings involved the following issues to be determined:

1. Was the sale of goods by Warehouse Sales to its subsidiary entity WHS2, a sale free of the retention of title security interest of the supplier of goods to Warehouse Sales?
2. Were lay-by customers of Warehouse Sales able to complete sales and take goods free of any retention of title security interest of the supplier to Warehouse Sales?
3. Are customers of Warehouse Sales who had part paid for goods (not on lay-by terms) and had not collected their goods, able to complete the sale and take the goods free of any retention of title security interest by the supplier to Warehouse Sales?

Transfer of goods to the subsidiary WHS2

Initially the liquidator's conducted the liquidation on the basis that goods held by WHS2 was the property of Warehouse Sales. However on receipt of further legal advice, the liquidators came to the view that WHS2 may have obtained the goods from Warehouse Sales free of any security interest of suppliers to Warehouse Sales.

Under the *Personal Property Securities Act* 2009 property transferred will be free of any security interest when it is a sale in the ordinary course of business of the seller (section 46); or the secured party authorised the disposal of the property giving rise to proceeds (section 32).

His Honour Judge Sifris said the critical question to be determined was whether the sales by Warehouse Sales to WHS2 were of the kind comprising the ordinary course of business of Warehouse Sales and therefore specifically authorised by the suppliers to Warehouse Sales.

The features of the dealings between Warehouse Sales to WHS2 included:

- Both companies had the same two directors.
- Warehouse Sales owned 80% of shareholdings in WHS2.
- There was a running account between Warehouse Sales and WHS2 recording sales of goods and a monthly statement was issued to WHS2.
- Goods were sold to WHS2 at cost value less rebates.
- WHS2 transferred cash amounts to Warehouse Sales daily which was noted in the running account.
- Goods at Wodonga were recorded in the books as owned by WHS2.
- WHS2 owed Warehouse Sales over \$2m at the time of the appointment of the liquidators.

Apart from one exception, the court found the sale of goods by Warehouse Sales to WHS2 was in the ordinary course of business of Warehouse Sales. The evidence was that the business of Warehouse Sales was not just selling to mum and dad customers at its stores but also through resellers such as WHS2.

The court found the suppliers' terms of trade with Warehouse Sales expressly or impliedly authorised a sale of goods of the kind conducted by Warehouse Sales with WHS2.

The position for one of the suppliers, Panasonic, was different in that its terms of trade prohibited sales by Warehouse Sales to a reseller. Accordingly, Panasonic's retention of title interest remained in goods held by WHS2 even though its goods sold to Warehouse Sales were on-sold to WHS2.

Lay-by sales

The court held that suppliers with a retention of title security interest were entitled to stock the subject of lay-by sales in priority to the lay-by customer. The main basis for this decision was because the lay-by sale terms provided that ownership of the goods remained with Warehouse Sales until paid in full by the customer. The lay-by customers had not paid for the goods in full.

Part paid sales

The court found that customers who purchased goods which had not been collected, even if part paid, could complete the transaction and take the goods free of any security interest of a supplier. The court distinguished normal sales from lay-by sales as there was no condition

in normal sales that title remained with Warehouse Sales until paid in full.

It should be noted that further proceeds paid by the customer to complete the sale would form part of the security interest of the supplier. Also, if the customer did not complete the sale then the suppliers retention of title claim applies.

Ramifications for trade credit suppliers

The following can be drawn from this case:

1. Trade suppliers who sell on retention of title terms may lose their claim to stock when the debtor transfers the stock to a related entity. In this instance, the suppliers' claim will be limited to any identifiable monies received by the debtor under the sale.
2. Trade suppliers can better protect their interest in stock by prohibiting sales by their customers to related entities in terms of trade.
3. Whether or not a suppliers retention of title interest has priority over a claim by a part paid customer of the debtor depends on the terms of the sale agreement between the debtor and customer.

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