

# PPSA Precedent - NSW Supreme Court finds in favour of Trade Credit Supplier against Liquidator

Daniel Turk & Georgina Wu | November 2015 | Commercial Disputes & Transactions

## Summary

A TurksLegal client recently had success in the Supreme Court of NSW obtaining orders confirming its retention of title ('ROT') rights which were denied by the liquidators.

In handing down its decision *In the matter of Gelpack Enterprises Pty Ltd (in liquidation)* [2015] NSWSC 1558 ('*Gelpack*'), the Supreme Court provided useful guidance which will assist suppliers in the recognition of their Purchase Money Security Interest ('PMSI') under the *Personal Property Securities Act 2009* ('PPSA'). This decision also provides guidance to suppliers on the form of acceptance of terms and conditions of trade ('T&Cs') required in order to trigger the grant of security interest. *Gelpack* is one of the few decisions available to date where the application of PPSA has been considered in a practical context.

## Who does this impact?

*Gelpack* impacts suppliers who supply on credit and liquidators.

## Background

The plaintiff supplied resin on credit terms to Gelpack Enterprises Pty Ltd (in liquidation) ('Company') where ROT applied.

Upon liquidation, the plaintiff through its PMSI, sought an accounting of its stock on hand with the liquidators, and also the proceeds of sale of its resin and products manufactured with its resin.

The liquidators rejected the ROT claim on the basis that the most recent T&Cs containing the ROT clause and the grant of security interest were not authorised by the Company.

In 2007, the trading terms were signed off by the Company (by its director) in an application for credit. Those terms included a ROT clause and a clause reserving the plaintiff's rights to vary these conditions with immediate effect.

In August 2012, the plaintiff sent a generic letter to their customers, including the Company, attaching new T&Cs which included a ROT clause and the grant of security interest under the PPSA. The letter notified the customer of the plaintiff's PPSA registration, and noted that the new T&C "will apply to any orders accepted after this notification" (the new T&Cs also contained a similar term) and invited the recipient to sign and return a copy as acknowledgment of receipt and consent. The T&Cs were signed by the Company's Operations Manager.

The liquidators disputed that the Operations Manager had authority to accept the T&Cs.

All invoices issued by the plaintiff contained a typical ROT clause and a note that it was subject to its T&Cs.

## Judgment

The Court found that the 2007 credit application authorised the plaintiff to change its T&Cs whenever it chose to do so.<sup>1</sup> The plaintiff's letter dated 1 August 2012, had the effect of substituting the old T&Cs for the new T&Cs, no further act of acceptance was required.<sup>2</sup> Nonetheless, the Court went on further to say that:

- The Company had accepted the new T&Cs by conduct when it continued to place orders. It did not matter whether the T&Cs came to any person's attention.<sup>3</sup>

- The Operations Manager who had authority to negotiate prices and place orders would have authority to agree to a ROT clause.<sup>4</sup>

The Court went even further to say that the Company, by continuing to pay for the plaintiff's invoices and re-order further goods knowing that the invoices were subject to the ROT clause and T&Cs, either ratified the Operations Manager's entry into the new T&Cs or, by the repeated course of dealing, incorporated into each separate contract between them the ROT clause.<sup>4</sup>

The Court held that the invoices created security interest in the nature of ROT clause over the goods supplied.<sup>6</sup> Costs orders were made against the liquidator.

## Implications

*Gelpack* made it easier for suppliers to enforce their PMSI:

- T&Cs may be updated by the supplier from time to time and still be binding on the customer without written acceptance or having come to any particular person's attention (subject to acceptance by conduct).<sup>7</sup>
- T&Cs containing express grant of security interest do not need to be signed by the customer and may be adopted by conduct, in the form of the customer continuing to place orders.<sup>8</sup>
- ROT clauses as printed on tax invoices can create valid PMSI (subject to the registration of the security interest on PPSR).<sup>9</sup>
- One PPSA registration can cover security interest created by multiple contracts such as repeated series of invoices.<sup>10</sup>
- Terms do not necessarily need to be signed off by directors of the company.

Suppliers should ensure that the wording of their T&Cs and ROT clauses are consistent and carefully drafted. Most important of all, suppliers should ensure that their PMSIs are registered on the PPSR correctly and in accordance with the requirements under the PPSA.

<sup>1</sup>In the matter of *Gelpack Enterprises Pty Ltd* (in liquidation) [2015] NSWSC 1558 [20].

<sup>2</sup>*Ibid* [21].

<sup>3</sup>*Ibid* [26].

<sup>4</sup>*Ibid* [32].

<sup>5</sup>*Ibid* [27].

<sup>6</sup>*Ibid* [27].

<sup>7</sup>*Ibid* [22].

<sup>8</sup>*Ibid* [32].

<sup>9</sup>*Ibid* [34] – [37].

<sup>10</sup>*Ibid* [35].

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