Stuck on the BBQ – Apportionment of storage liens affecting stock in insolvencies

John Bennett | July 2019 | Commercial

Summary

A recent Supreme Court of New South Wales case has provided an invaluable lesson to insolvency practitioners and trade creditors to adopt a commercial and pragmatic approach when a storage lien extends to numerous stock items. The challenge presented in *Re Plantation Outdoor Kitchens Pty Ltd (in liquidation)* [2019] NSWSC 925 related to how to apportion the lien across the stock.

Storage (warehousemen) liens and priorities

A lien is the right to hold the property of another as security for the performance of an obligation or the payment of a debt.[1] Except in Tasmania, a statutory warehouse operator's lien may arise over goods deposited with a warehouse operator for storage and preservation charges. That lien must be satisfied before release of the goods to their owner. The lien also ranks higher in priorities with competing security interests such as the purchase money security interest (**PMSI**) granted to trade creditors under the *Personal Property Securities Act 2009* (Cth) (**PPSA**).[2]

POK's barbeque equipment and outdoor appliance retail business

Plantation Outdoor Kitchens (**POK**) was a barbeque equipment and outdoor appliance retailer who operated online and in store. Trade occurred at a showroom in St Leonards which held the majority of display stock. The remaining stock was stored at a warehouse in Revesby owned by Jackman Logistics. The Company usually sold the goods by payment in cash or card before delivery.

The handling of customer orders by POK

POK used the 'MYOB' computer program to monitor customer orders and stock. The system for this was that POK's sales team would enter details of the sale onto MYOB. The warehouse manager was then responsible for entering details of deliveries and fulfilments of orders on MYOB and closing fulfilled orders once collected by the customer.

Orders for larger stock items (such as barbeques) required fulfilment by the warehouse. When allocating stock for these orders, the warehouse manager would manually allocate the stock by locating it and physically labelling it with a printed label containing the customer's details. However, the warehouse manager would often not update the MYOB system after sticking the labels on the stock.

The difficulties in the liquidation of POK

On 26 April 2019, POK went into voluntary administration and on 31 May 2019, POK went into liquidation. On entering liquidation, the liquidator faced several difficulties including:

- The fact POK's MYOB records did not accurately record the allocation of stock with customers.
- Multiple orders for stock but with insufficient stock to meet the orders.
- Claims under the PPSA including supplier PMSIs.
- A warehousemen's lien claimed by Jackman Logistics.

Categories of stock

The liquidator identified six separate categories of stock held by POK as follows:

- **Category A**. Fully paid labelled stock sufficient to fulfil the customer's entire order.
- **Category B**. Fully paid stock but with an insufficient amount held to fulfil the customer's order.
- **Category C**. Fully paid stock but with more open MYOB orders than available stock.
- **Categories D and E**. Stock subject to PMSIs.
- **Category F**. The remaining stock.

The liquidator's levy and the warehousemen's lien

To recover preservation costs of the stock, the liquidator relying on previous court decisions[3] sought to charge a levy over the stock claimed by customers and suppliers. The liquidator submitted that the levy was the most equitable approach given the warehousemen's lien claimed by Jackman Logistics.

Issues

The issues were:

- Whether title in the Category A, B and C stock had passed to the customers.
- Whether the liquidator was justified in charging a levy apportioned to the customers and suppliers for the expenses incurred in identifying, preserving and distributing the stock.

Decision

The title in the Category A, B and C stock passed to the customers because the labelling was an unconditional appropriation of the goods under the contract for sale. The customers took this stock free of the supplier security interests but subject to the warehousemen's lien.

The liquidator in principle was justified in charging the levy. However, the Court adjusted the liquidator's apportionment of the lien costs contained in the levy to reduce the cost for Category A customers and increase it for Category B, C and E claimants. The Court considered that once the liquidator (with the benefit of legal advice) had ascertained the Category A stock, further costs should not be borne by the customers in that category. The Court accepted though that there were issues as to how to deal with the Category B and C stock. Further, the Court noted that the PMSI suppliers had contributed to the delay in resolving the issues by the lack of provision of details of stock claimed under their PMSIs.

Implications

The lesson is to adopt a pragmatic and commercial approach in liquidation when a storage lien extends to numerous stock items. This lesson was evident in three different ways.

Firstly, the Court postulated what claim the warehouse owner could make for storage, preservation and other charges if only one stock item was in issue. The Court reasoned that it could not be the case the owner of that one stock item could be met with a claim for storage amounts or other charges referable to other items in which the owner has no interest. Viewed that way, the Court considered the apportionment proposed by the liquidator was reasonable.

Secondly, the Court found it was not reasonable for the Category A stock customers to pay storage charges once it became clear to the liquidator that title in this stock had passed. The Court accepted that it was reasonable for the liquidator to make enquiries about this. However, the liquidator had already made sufficient enquiries by discovering the labelling and appropriation of stock to customer orders and had also had the opportunity to obtain legal advice on the issue.

Thirdly, further lien costs were apportioned to the suppliers in part due to delay in providing details of stock claimed as subject to PMSIs. The lesson for suppliers is that they must quickly identify their stock subject to a PMSI claim to minimise potential additional costs.

[1] *Hall v Richards* (1961) 108 CLR 84.
[2] PPSA ss 14 and 73.
[3] *Crouch v Adams* [2006] NSWSC 1029; *International Art Holdings Pty Ltd (admin apptd) v Adams* [2011] NSWSC 164; In the matter of *Renovation Boys Pty Ltd (admins apptd)* [2014] NSWSC 340.

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