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Retention of Title Clauses

– Where Goods On-Sold to Third Party – New Case!!

In *GE Commercial Corporation (Aust) Pty Ltd v Mell Associates Pty Ltd & Ors* [2009] NSWSC 787, GE sought declarations that it had title to caravans which it bought from Oakhurst. Oakhurst purchased the caravans from LMC. LMC said it was not paid for the caravans and cross-claimed that it had title under a retention of title (“**ROT**”) clause. Oakhurst had gone into liquidation and was not a party to the proceedings.

LMC claimed that the goods were sold to Oakhurst pursuant to terms on each invoice. To finance the purchase, Oakhurst entered into a floor plan arrangement with GE which comprised a Distribution Agreement, Bailment Agreement and Fixed and Floating Charge. Under the Bailment Agreement, Oakhurst warranted that upon purchase of goods, GE would have absolute and clear title and be entitled to possession free of all adverse interests. The usual practice was that upon receipt of an invoice from LMC, Oakhurst would send to GE a copy of the invoice and a Payment Statement. GE would then pay LMC by direct transfer. LMC would send Oakhurst a spreadsheet of items supplied and Oakhurst would mark off which items were paid for by the payments. LMC would apply the funds from GE towards payment of those items. Oakhurst also supplied GE with a list of items paid for. The parties agreed that 58 caravans were the subject of the dispute in that they were marked as being unpaid in LMC’s list, and paid in GE’s list. LMC relied on the ROT clause to assert that it still owned those caravans.

Whether sale contract included ROT clause

The front of each invoice stated that the supply was made in accordance with the general terms of trade. At the back of each invoice, the terms were titled “Conditions of Sale and Delivery”. Although the terms were in German, Oakhurst could not argue it did not accept them on the basis it did not understand them, as it never objected or requested a translation, and continued dealings. Palmer J found that the terms on the back of the invoices were incorporated as terms in each contract for sale.

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Whether ROT clauses void for uncertainty

There were 4 apparent ROT clauses on each invoice. The first provided that title in the goods supplied by that invoice remained with LMC until payment. This appeared on the front of the invoice. The second provided that title passed only when all moneys due to LMC during the course of the dealership had been paid.

LMC argued that as it had not been paid for the 58 caravans, it still had title to them under the first ROT clause.

This argument failed. The Court held that these two ROT clauses were merely reminders that there were ROT clauses on the back of the invoice, and were not intended to be contractual terms.

Whether Clause 3 authorised on-sale with title

The third ROT clause (“**ROT-3**”) was at the back of the invoice, being the first part of Clause 3. It provided that LMC retained title until all payments originating from the business relationship with LMC were received. The fourth ROT clause (“**ROT-4**”), being the last part of Clause 3, authorised the on-sale and passing of title of the goods. In effect, ROT-4 assigned to LMC the right to receive the proceeds of sale.

The relationship between LMC and Oakhurst continued for many years. If ROT-3 was applied without qualification, it could produce the uncommercial result that none of Oakhurst's customers would receive title to the caravans if Oakhurst went into liquidation in later years with monies unpaid to LMC. LMC would have the right to repossess caravans sold years ago if Oakhurst defaulted.

ROT-4 was said to avoid these consequences by allowing Oakhurst to on-sell the goods, and pass title to the customer. Once sold, LMC had a right to the proceeds of sale.

The Court held that in accordance with ROT-4, title in the 58 caravans passed to GE when Oakhurst sold them to GE in the ordinary course of its business. GE was entitled to possession.

The Court declared that GE had good title to the 58 caravans as against LMC.

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