
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountants

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PPSA AND RETENTION OF TITLE

Introduction

In May 2015 the Court of Appeal in the Supreme Court of Victoria handed down its judgment in *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton* [2015] VSC 92. The case highlights the impact of the *Personal Property Security Act* ("PPSA") on commercial agreements between suppliers and purchasers of personal property and the importance of clear and concise wording when drafting terms and conditions of sale.

Background

Central Cleaning Supplies (Aust) Pty Ltd ("Central") sold cleaning equipment to Swan Services Pty Ltd ("Swan"). On 3 September 2009 Swan applied for a 30 day commercial credit facility with Central by completing a credit application. The credit application was said to be governed by Central's standard terms and conditions, although those were not specified in the credit application or attached to the form.

Following receipt of the credit application, Central supplied Swan with cleaning equipment. Central's invoices sent to Swan included a retention of title ("ROT") clause which stated that the

goods supplied pursuant to the particular invoice remained the property of Central, until the whole of the purchase price had been paid by the customer.

On 31 January 2012 the PPSA came into effect. Following the introduction of the PPSA, suppliers of goods with ROT clauses were required to register their security interests in those goods on the Personal Property Securities Register ("PPSR"), if they wished to enforce their security (ROT clause). During the two year period following the PPSA's introduction, suppliers who held security agreements which predated the PPSA and incorporated ROT clauses were protected by the PPSA's transitional provisions. Those transitional provisions expired on 31 January 2014.

Central did not register its security interest on the PPSR. On 22 May 2013 Administrators were appointed to Swan who subsequently became Liquidators on 27 June 2013. As at the date of appointment of the Administrators, there were unpaid invoices relating to equipment supplied by Central to Swan between November 2012 and May 2013. Central sought to enforce the ROT clause on each of those invoices and

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recover the equipment supplied. The Liquidators resisted those claims. Their reasoning for rejecting Central's ROT claim was that Central had not registered its security interest on the PPSR and that its credit application did not include an ROT clause. Therefore, Central did not have the benefit of the transitional provisions. The Liquidators argued that as Central held an unregistered, and thus unperfected security interest, the equipment had vested in Swan pursuant to Section 276 of the *PPSA*.

Central appealed the Liquidator's decision pursuant to Section 1321 of the *Corporations Act*.

Decision at first instance

Justice Ferguson of the Supreme Court of Victoria found in favour of the Liquidators. The issue before Justice Ferguson was whether Central's security interest, being the ROT clause, was incorporated into the credit application such that the credit application was a transitional security agreement under the *PPSA*. Central contended that at the time that Swan was placed into administration it had the benefit of the transitional provisions because:

- from September 2009 the credit application governed supplies made by Central to Swan;
- by incorporating the ROT clause, the credit application provided for the granting of a security interest (namely in goods supplied by Central to Swan pursuant to the credit application) and, therefore the credit application was a security agreement under the *PPSA*;

- because the credit application was in force and continuing as at 30 January 2012 the credit application was a transitional security interest under the *PPSA*; and,
- the equipment was supplied pursuant to the credit application, such that the security interests provided for in the equipment were transitional security interests under the *PPSA*.

Central submitted that the credit application plainly contemplated that there would be ongoing supplies made on its standard terms and conditions in force from time to time. It submitted that the ROT clause was incorporated into the credit application, because when Swan signed the application, it warranted that it understood the terms and content in the credit application. Central submitted that this must have also included the ROT clause which was referred to in the conditions of sale on the invoices. Further, Central submitted that the ROT clause had appeared on the first invoice issued after the credit application was signed and continued to appear on each and every subsequent invoice issued by Central to Swan.

Clause 2 of the credit application referred to Central's standard terms and conditions from time to time. There was no evidence within the credit application as to what were those terms. Justice Ferguson determined that this clause should be interpreted as extending to incorporate terms recorded in a separate document, which existed as at the date of the agreement. Instead, Central relied on the ROT clause on the invoices that were issued after the credit application was executed, and that

clearly treated each sale as a separate contract. Justice Ferguson determined that the ROT clause on those invoices formed part of each separate and individual contract of sale but it was too late for the ROT clause to be incorporated as a term of the credit application.

Her Honour determined that the ROT conditions were incorporated into the separate contracts that were the subject of the proceedings, but those contracts came into existence after 30 January 2012. It was only those separate and distinct contracts that provided for security interests and the transitional provisions did not apply. The credit application was not a transitional security agreement because it did not provide for the granting of a security interest. Therefore, Central did not have the protection of a perfected security interest.

Court of Appeal

Central appealed the judgment. All three judges of the Victorian Court of Appeal had no difficulty allowing the Appeal and determining that Central was protected by the transitional provisions of the *PPSA*. Therefore, the equipment which had been supplied to Swan prior to the voluntary administration was protected by ROT clauses on the individual invoices.

The Court found that the terms by which Central agreed to provide credit to Swan included the ROT clause as a standard term of each supply of equipment. The Court resolved that it was of critical importance to establish when and how the agreement between Central and Swan was made in order to determine whether or not it met the

requirements under the *PPSA* to be deemed a transitional security agreement.

At first instance, the trial judge had proceeded on the basis that a binding agreement came into force between Central and Swan on 3 September 2009, when Swan lodged the credit application. The Court of Appeal disagreed. The Court of Appeal held that by executing the credit application, Swan had signified its intention to enter into a commercial relationship with Central. However, until Swan's offer was accepted, no such relationship existed. The mere signing of a credit application did not create a contract and the lodgement with Central did not impose on Central a contractual obligation to do anything. In the absence of any communication by Central of its acceptance, the terms of the application would not become binding on either party until Central provided the equipment and extended the 30 days of credit that Swan had requested.

The Court determined that Swan did not become bound by the credit terms until the first goods were supplied on credit, after the application was made. The first supply of equipment under Central's standard terms and conditions occurred on 4 September 2009. This was after the signing of the credit application and on the terms and conditions set out in the invoice, which included the ROT clause.

The Court concluded that:

- Swan's application for credit provided an undertaking to be bound in respect of every supply of equipment by Central's standard terms of supply;

- the ROT clause was a standard term and condition of supply in existence, on the date on which the credit agreement became binding on Swan, being the date on which Swan received the first invoice for equipment supplied by Central; and,
- under the agreement Swan accepted that all future supplies of equipment would be governed by that standard term.

The Court found that the agreement between Swan and Central was a transitional security agreement. Therefore, Central had the benefit of a

security interest under the transitional provisions, despite the fact that it had not registered its security interest on the PPSR.

Conclusion

Although the transitional provisions in the PPSA have now ended, this case highlights the importance of clear and concise wording on credit applications and invoices. Central was only successful in retaining its equipment due to the operation of the transitional provisions in the PPSA. If this dispute were to arise now on the same facts, a creditor would have no recourse.

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**Business Recovery Services
Official Liquidators & Trustee in Bankruptcy**

Level 8, 6 - 10 O'Connell Street, Sydney, NSW, 2000
GPO Box 882, Sydney, NSW, 2001
Telephone: (02) 9233 6088 Facsimile: (02) 9233 1616

www.woodgateco.com.au

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