



## Warning To All Suppliers: Enforce Your Retention of Title Clauses

*Suppliers of goods around the country need to re-examine their trade terms and conditions in light of the recent Supreme Court decision in Dwyer & Ors and Davies and Ors v Chicago Boot Co Pty Ltd [2011] SASC 27 handed down on 1 March 2011.*

This case concerned the highly publicised collapse of the variety store Harris Scarfe. The plaintiffs in the case, which were the liquidators, brought a claim against Chicago Boot Co who owned the Windsor Smith brand, for unfair preference in relation to various payments made by Harris Scarfe to it, at or around the relevant relation back date.

Chicago Boot submitted amongst other things, that the payments made by Harris Scarfe fell outside the scope of section 588FA, of the Corporations Act, which dealt with unfair preferences, as they were payments for goods, which were subject to a Retention of Title clause (**ROT**). The ROT clause on which Chicago Boot sought to rely, was found on the back of their invoices, which were generated at the time that either the order was made or the goods were delivered to Harris Scarfe.

A ROT clause is a method by which a seller of goods, reserves the legal and beneficial ownership of the goods, until such time as those goods are paid for in full, despite the fact that possession of the goods has passed to the purchaser.

The ROT clause in this case stated that:

(a) until goods supplied by the Company to the Customer are paid for in full:

(i) ownership of the goods shall remain with the Company but the risk shall pass to the Customer on delivery;

(ii) the relationship between the parties shall be fiduciary and the Customer shall hold the goods as bailee for the Company;

(iii) the Customer shall store the Company's goods separately from its own;

(iv) the Company authorises the Customer to on-sell the goods but only as agent for the Company. The Customer shall however, not represent to any parties that it is in any way acting for the Company and the Company will not be bound by any contracts with the parties to which the Customer is a party;

(v) the proceeds of any sale shall be paid into a separate account and the Customers shall account to the Company from these funds for the full price of the goods. Records shall be kept by the Customer of any goods owned by the Company.

(b) In the event that the Customer defaults or commits an act of bankruptcy or a receiver is appointed and/or it goes into liquidation then without prejudice to any other rights the Company may have, the Customer by receiving delivery of the goods authorises the Company to take repossession of any unpaid for goods and resell same goods without accounting to the Customer for the proceeds of sale.

It was held by Justice Sulan of the Supreme Court, that a ROT clause must be read with considerable regard to the entirety of the contract and dealings of the parties. His Honour concluded that whilst the ROT, that appeared at the back of the invoices was some evidence of the



parties' intention that title for the goods not pass until the goods have been paid for, it was not unequivocal.

Instead His Honour chose to look at the manner in which the parties conducted business in order to reach his conclusion. His Honour stated that it was an important aspect of any enforceable ROT clause, that the goods sold to the purchaser, be identifiable and that the purchaser be able to account for goods on sold to customers<sup>1</sup>.

In cross-examination it was revealed that the terms of the ROT clause as they were printed on the invoices, were rarely adhered to. Goods were not stored separately by Harris Scarfe and proceeds from sales of any goods that had been purchased from Chicago Boot, were not kept in a separate Harris Scarfe account.

In response it was submitted by Chicago Boot that it was highly impractical to enforce such a clause, albeit standard, as it imposed an onerous obligation on Harris Scarfe. Furthermore, there was no need for the goods to be kept separately, as all goods purchased from Chicago Boot were clearly identifiable by its brand "Windsor Smith". In such a scenario, Chicago Boot contended that the ROT clause could be easily enforced, in light of non-payment, by simply removing all Windsor Smith brand shoes from the various stores.

His Honour disagreed with these submissions and stated that the relationship between Chicago Boot and Harris Scarfe was not that akin to a trustee, but rather one describable as a debtor /creditor relationship. In so doing His Honour referred to the case of *Henry v Hammond*<sup>2</sup>

<sup>1</sup> Dwyer & Ors and Davies and Ors v Chicago Boot Co Pty Ltd [2011]SASC 27 at 117  
<sup>2</sup> [1913] 2 KB 515

where money was not kept separately, but rather an equivalent sum was handed over when called upon. In such a scenario the learned judge held that no trust or fiduciary relationship had arisen.

Likewise in the present case Justice Sulan, concluded that over the years the relationship between Chicago Boot and Harris Scarfe had changed to such an extent that neither party intended for the ROT clause to be operative. No effort was made by Chicago Boot to enforce the terms of its ROT clause and no effort was made by Harris Scarfe to abide by the same terms.

The decision of the Supreme Court, should act as a warning to the many suppliers who by way of habit print ROT clauses on their invoices, but seldom attempt to enforce them so as not to create any animosity with the purchaser.

A ROT clause is only as good as the way it is enforced and enforcing it only when a problem has occurred may no longer afford sufficient protection to the seller.

▶ Should you have any questions or would like further advice, please contact:

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