

Online Retailing - Who owns what when the music stops

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Unlike traditional retailing, online retailers may warehouse a significant amount of stock that has been paid for though not shipped. This is particularly the case when the customer purchases a range of products meaning that the order cannot be promptly shipped, for instance because the retailer does not have in stock all of the products. Delivery can be delayed for a number of days if not weeks whilst the entire order is filled.

This creates the following difficulties for administrators appointed to online retailers. These difficulties were last month addressed by Justice Black of the NSW Supreme Court^[1], following an application by the administrators for judicial directions.

Difficulties:

1. Does the company or the customer own the goods the subject of the purchase order?

Title to goods does not always pass to a customer notwithstanding that the customer pays for the goods in full. It becomes particularly difficult to determine whether title to goods has passed when the goods do not have a means of individual identification.

Where a company has only one item in stock to fill a customer order, that item will be considered “specific” or “ascertained” within the meaning of the Sale of Goods Act 1923 (NSW). Accordingly, where a customer has paid for that item in full and the item is “allocated” to the customer order, property in that item passes to the customer, unless the company’s terms of sale expressly provide otherwise.

However, where the company has numerous goods available to fill a customer order, the goods will be considered “unascertained”, and property in the goods will not pass to a customer until the goods have been “unconditionally appropriated” to a customer order.

To determine whether the goods have been “unconditionally appropriated” to a customer’s order, it is necessary to obtain an understanding of how the company’s inventory management system works.

The company’s act of allocating the goods to a customer order, through its inventory management system, will generally be sufficient to mean that “unconditional appropriation” of the goods has occurred.

Where a company has over-allocated goods to customer orders, an “unconditional appropriation” of goods to the customer orders is said to have occurred. In these circumstances, title to the goods is said to have passed to these customers as tenants in common.

2. Picking, packing and storage costs

In practice it is unlikely that “unconditional appropriation” has occurred with respect to all the goods the subject of the purchase order in the company’s warehouse. Accordingly the company will be warehousing both goods it owns and goods owned by its customers.

Administrators will be faced with incurring expenses identifying, preserving and distributing the goods – even in relation to those goods owned by its customers.

The alternative is for the administrator to abandon the goods and take his/her chances that the customers will not challenge the abandonment.

Should an administrator incur such costs, the administrator is entitled to an equitable lien for reasonable expenses incurred in the identification, preservation and distribution of goods to the owner of those goods.

By reason of the equitable lien, an insolvency practitioner can levy a proportion of the reasonable expenses incurred. These expenses can include leasing / storage costs, wages costs of utilities and office supplies, relocation costs and the insolvency practitioners costs.

If an owner declines to pay the levy or the goods are not collected, the goods can be disposed of and an insolvency practitioner is entitled to recover the expenses incurred in the identification, preservation, distribution and disposal of that stock from the proceeds of sale.

The practice of asserting a lien and sale if the lien is not paid,, was endorsed by the Court in the matter of Renovation Boys Pty Ltd (admins apptd) [2014] NSWSC 340, which involved an application by the administrator of that company for judicial directions.

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