

update

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Friday Facts: "ROT" extended

In our last edition of Friday Facts, we explained retention of title clauses ("ROT") which are incorporated into contracts to ensure that title to goods does not pass on delivery but rather on payment. An extension of ROT is the creation of a charge or alternatively a trust.

The creation of a charge over the goods supplied can have the effect of ensuring that the supplier becomes a secured creditor in circumstances where the purchaser becomes insolvent. However a charge will not be effective against a liquidator if the charge is not registered with ASIC. In the case of the supply of goods, most suppliers will not seek to register a charge that has been incorporated into their supply agreement.

For that reason the concept of incorporating and extending the ROT clause to create a trust was considered by the High Court in *Associated Alloys Pty Ltd v ACN 001 452 106*. In that case the High Court was prepared to find that the retention of title clause created an express trust in favour of the supplier, such that until payment for the goods was made in full, the goods were held on trust for the supplier.

The clause which had been inserted into the supply contract by the supplier stated that:

"In the event that the Buyer uses the goods/products in some manufacturing or construction process of its own or some third party, the Buyer shall hold such part of the proceeds of such manufacturing or construction process as related to the goods/products in trust for the Seller. Such

part shall be deemed to equal in dollar terms the amount owing by the Buyer to the Seller at the time of the receipt of such proceeds".

The liquidator claimed that even if the clause was effective in granting a property right over such proceeds to the supplier, the right was created by way of charge and that charge was void against the liquidator because it had not been registered with ASIC.

The High Court was nonetheless prepared to accept that the clause created an express trust in favour of the supplier.

Whilst the supplier was successful in establishing that a trust had been created in its favour, the High Court held that it had failed to establish the necessary link between the funds held by the purchaser and the goods supplied by the supplier under any particular invoice. Therefore it could not conclude from the evidence that there were any trust funds to which the proceeds term could apply.

For more information

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