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Retention of Title Clauses – A Registerable Security Interest?

Introduction

The High Court decision in *Comans Wholesale (“Comans”) V J. Donohue Beverages Ltd (In Receivership) (“JDB”) & ors* [2019] IEHC 657 (judgment delivered on 8 October 2019 by Murphy J) considered (a) whether a retention of title clause created a trust or a charge in favour of the plaintiff, and (b) whether a charge over future proceeds constitutes ‘cash’ within the meaning of section 408 of the Companies Act 2014 (the “CA”) which is not a registerable security interest under section 409 of the CA.

Background

Comans supplied and sold drinks and related goods to JDB, such sale and supply was subject to ‘Comans General Conditions of Sale and Supply’. Clause 9 the (“**ROT Clause**”) of the general conditions provided, in summary, as follows:

1. Title of the goods shall not pass to JDB until all invoices for the goods are discharged to Comans;
2. JDB shall hold the goods as Comans fiduciary agent and shall keep the goods marked and stored separately from other goods to be identifiable as the property of Comans;
3. JDB may resell the goods at full market price even though title has not passed to JDB provided they hold in a fiduciary capacity on trust for Comans from the proceeds of such resale a sum equal to the price of the goods (“**Comans Proceeds**”); and

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4. JDB shall keep the Comans Proceeds in a separate bank account clearly denoted as an account containing monies deposited for the benefit of Comans.

Receivers were appointed over JDB by Bank of Ireland (“**BOI**”) as the holder of a security interest over all the debts of JDB. The receivers identified and returned goods, which had not been paid for by JDB, to Comans pursuant to the ROT Clause. Comans claimed an additional €334,362.58 being the proceeds of the sale of goods by JDB for which Comans had not received payment. The additional claim of entitlement was also made pursuant to the ROT Clause.

Comans claimed the ROT Clause created a trust in their favour and JDB was acting in its capacity as a trustee or fiduciary of Comans, and therefore the €334,362.58 was held on trust by JDB for Comans. Alternatively, Comans argued that should the ROT Clause create a charge, that the charge falls within section 408 of the CA and would not require registration in the CRO to be effective.

BOI claimed the ROT Clause constituted a charge which was void for failure to register under section 99 of the Companies Act 1963 (as amended) (“**Section 99**”) and that BOI had a claim over all proceeds of sale received by JDB in the absence of a valid claim by Comans.

Judgment

The High Court found:

- a) The ROT Clause created a charge over the proceeds of sale and not a trust in favour of Comans; and
- b) The charge was not registered with the CRO, as required under Section 99 and was therefore void.

In relation to point (a) above, the court referred to two decisions in which the same conclusion was reached, being the decision of Murphy J in *Carroll Group Distributors Ltd v G&JF Bourke Ltd* (“**G&JF**”) [1990] ILRM 252, and the decision of Irvine J in *Unitherm Heating Systems Limited v Kieran Wallace as Official Liquidator of BTH Group Ltd* [2015] IECA 191.

In the *Carroll* case Murphy J held a charge, which required registration, had been created and that the absence of such registration rendered the charge void. Murphy J reached his conclusion based on a number of factors: including the fact that G&JF were permitted to sell the goods in the ordinary course of business; the fact that the account in which proceeds were to be held had not been set up, and even if it had been, it would have contained an amount in excess of what was owed; and that it was the substance of the transaction that determined registerability and not the labels the parties attach to it.

In the *Unitherm* case Irvine J identified the following factors as influencing her decision in holding a charge which required registration had been created: Unitherm’s right to sell the goods in the ordinary course of business; the credit period that was afforded to Unitherm; that the standard conditions of sale sought to create a trust over all monies received from sales; and no separate account had been set up. Irvine J was of the view that the agreement lacked standard obligations which are expected in an agency agreement.

The court held that in continuing contracts for the sale of goods the relationship between the buyer and seller is one of creditor and debtor. As such, retention of title clauses in contracts for the sale of goods do not establish a relationship of principal/agent in which a trust in favour of a supplier can be inferred. Murphy J noted that while there were differences in the wording of the retention of title clause in this case from those in Unitherm and Carroll, namely the requirement that the defendant hold only the proceeds of sale due to the Comans in a separate designated account, these differences did not alter the nature and purpose of the retention of title clause. Murphy J, as he did in the Carroll case, looked at the facts of the agreement rather than the labels attached to it, and held the retention of title clause created a charge, not a trust.

The court held that language of section 408 stipulates charges that do not require registration where they create an interest over cash and money credited to an account of a financial institution, or any other deposits. The court found that a charge over future proceeds would not constitute cash within the meaning of section 408. The charge therefore required registration with the CRO to become effective and if not registered, as in this instance, would be void.

The court did note that had a bank account been set up to hold the proceeds of sale of the plaintiff's goods, the exception under section 408 may have applied.

Significance of the Decision

This case confirms the recent authorities the recent authority of Unitherm and confirms that retention of title clauses in continuing contracts for the sale of goods may not establish a relationship a principal/agent from which a trust might be inferred.

The decision also highlights that a charge over future proceeds will not constitute 'cash' within the meaning of section 408 of the Companies Act and therefore will require registration, pursuant to section 409, with the CRO in order to be effective. Where are retention of title clause is not registered it will be deemed void.

Careful consideration of retention of title clauses will be required when entering into supply arrangements.

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